

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI  
TĀMAKI MAKĀURĀU ROHE**

[2023] NZERA 683  
3141241

BETWEEN SHAY WRIGHT  
Applicant

AND TE WHARE HUKAHUKA  
LIMITED  
Respondent

Member of Authority: Rachel Larmer

Representatives: Simon Greening, counsel for the Applicant  
No appearance by the Respondent

Investigation Meeting: 20 September 2023 at Auckland

Other information received: 2 and 12 October 2023 from the Respondent  
18 October 2023 from Applicant

Date of Determination: 17 November 2023

---

**DETERMINATION OF THE AUTHORITY**

---

**Application for a non-publication order**

[1] An in-person investigation into the Applicant Mr Shay Wright's unjustified dismissal claim against the Respondent Te Whare Hukahuka Limited was held in Auckland on 20 September 2023. The Respondent did not appear at the investigation meeting.

[2] On 2 October 2023 the Respondent applied for a non-publication order to protect commercially sensitive and private information. This was an overly broad application that sought non-publication of financial details, client names, projects and contract values, the employment agreement, company policies, personnel matters, performance and management details, details of private conversations, workplace disputes and proposed role changes.

[3] On 12 October 2023 the Respondent provided further details of the specific information it wanted to be subject to the non-publication order.

[4] Mr Wright informed the Authority on 18 October 2023 that he was not opposed to the non-publication of commercial information that may be referred to in the Authority's determination but he objected to the anonymisation of the parties and Respondent's directors' names. Mr Wright told the Authority during the investigation meeting that a public determination was an important part of clearing his name and restoring his reputation.

[5] The Authority has declined to issue a non-publication order, on the basis that there is an overriding public interest in open justice. In particular, Mr Wright told the Authority that he had been approached by clients and others in the community to ask why he was no longer in his role as an employee of the Respondent's. This determination addresses that.

[6] The parties' concerns about commercially sensitive information and in particular about the Respondent's financial details have been able to be addressed by the Authority either omitting, or redacting, that specific information from this determination. Accordingly, no non-publication order has been made, on the grounds it was not required.

### **Employment Relationship Problem**

[7] Mr Wright and Mr Travis O'Keefe describe themselves as Co-Founders of Te Whare Hukahuka Limited. Mr Wright was employed by the Respondent with the title Co-Founder on 1 April 2017. He had an individual employment agreement that was signed and dated 18 August 2017.

[8] From late 2019 and into 2020, Mr O'Keefe and Mr Wright had various conversations and disagreements around sales targets, work allocations and performance indicators for the business. No formal processes in relation to these matters were commenced or implemented by the Respondent with Mr Wright regarding those discussions.

[9] On 25 November 2020 Mr O'Keefe, who considered himself to be the Chief Executive Officer of the Respondent, wrote to Mr Wright advising that he had been given a written warning for unsatisfactory performance. This came out of the blue to

Mr Wright, as he had not been given any indication of formal performance management concerns prior to receiving this email.

[10] In an email dated 23 December 2020, Mr O’Keefe emailed Mr Wright and said *“I’m giving notice that the company is ending your employment relationship with you in 4 weeks.”*

[11] On 19 January 2021 Mr O’Keefe sent Mr Wright a WhatsApp message extending his final day as an employee of the Respondent to 31 January 2021. Mr Wright continued working until then and received his final pay on 17 February 2021.

[12] On 29 April 2021, Mr Wright raised a personal grievance for unjustified dismissal. The Respondent did not respond to the personal grievance or otherwise respond to the issues that Mr Wright had raised in his personal grievance letter.

[13] Mr Wright claimed his dismissal was procedurally and substantively unjustified. At the investigation meeting he withdrew the standalone breach of good faith claim he had made in his Statement of Problem (“SoP”) that was lodged with the Authority on 28 May 2021.

[14] He did that because he accepted that the Authority would be assessing the Respondent’s compliance with its statutory good faith obligations as part of its determination of his unjustified dismissal grievance claim.

### **The Authority’s investigation**

[15] The SoP was sent by the Authority to the Respondent’s registered address for service by track and trace courier on 2 June 2021. However, receipt of it was not signed for by the Respondent, because at that time New Zealand Couriers were having the courier driver sign that the item had been delivered instead of the customer who had received the delivery.

[16] The Respondent failed to engage with the Authority and did not lodge a Statement in Reply (“SiR”) which, based on the SoP being delivered on 2 June 2023, was due by 16 June 2021.

[17] Given the Respondent's non-engagement, and the fact that it had not personally signed for the track and trace courier delivery of the SoP, Mr Wright was required to personally serve the SoP on the Respondent, so that proof of service could be obtained.

[18] On 31 May 2021, the Duty Member issued a Direction to Mediation ("DTM") to occur within 40 days of the SiR being lodged. However, that direction had to subsequently be vacated after no SiR was lodged.

[19] An Authority Officer referred this matter to mediation on 5 August 2021. However, Mediation Services were unable to make contact with the Respondent, so the mediation file was closed.

[20] This matter was allocated to this Member in January 2022, and a DTM to occur within 30 days was issued on 11 January 2022. Mediation Services attempted to contact the Respondent by email on 15, 17, 21 and 23 February 2022, without response.

[21] The SoP and the DTM were personally served on the Respondent on 25 February 2022, meaning the SiR was due by 8 February 2022. No SiR was lodged.

[22] The Authority wrote to the Respondent telling him it needed to seek leave to lodge a SiR out of time, because it had failed to lodge a SiR within the 14-day statutory timeframe required by the Employment Relations Act 2000 ("the Act"). The Authority gave the Respondent till 18 March 2022 to seek leave to lodge a SiR out of time.

[23] The Authority also advised the parties that it had scheduled a Case Management Conference ("CMC") to occur on 25 March 2022. The Authority couriered a letter regarding the CMC to the Respondent's registered address by way of service, after multiple attempts to engage with Mr O'Keefe were unsuccessful.

[24] A CMC was held on 25 March 2022. Mr Wright was represented at the CMC, but the Respondent did not attend. It was agreed that a Zoom investigation meeting would take place on 20 April 2022. Directions of the Authority ("DoA") dated 25 March 2022 were issued to the parties, which contained timetable directions for the investigation meeting.

[25] The DoA recorded the Respondent's non-engagement with the employment institutions about this matter as at that date. It recorded that despite there being two directions from a duty member for the parties to attend mediation, that did not result in

mediation occurring. Nor had the Respondent complied with this Member's DTM issued on 11 January 2022.

[26] On 25 January 2022, the Respondent was personally served by a process server at its registered address for service with the SoP and the Authority's Notice of Direction ("NoD") dated 11 January 2022. The Respondent's SiR therefore had to be lodged by 8 February 2022, but that did not occur.

[27] The DoA dated 25 March 2022 gave the Respondent until 18 March 2022 (being another 38 dates after the time for filing a Statement in Reply had passed) to seek leave to file a Statement in Reply out of time. That did not occur.

[28] In the DoA dated 25 March 2022, the Authority gave the Respondent a further seven days after it had been served with the DoA to seek leave to lodge a SiR out of time. The process for it to do so was set out in the DoA.

[29] The DoA also provided that Mr Wright was to personally serve on the Respondent's registered address for service another copy of the service documents. The service documents consisted of the SoP and attachments, the NoD dated 11 January 2022, the DoA dated 25 March 2022, the Notice of Investigation Meeting ("Notice of IM") for the Zoom investigation meeting that was to occur on 20 April 2022 and Mr Wright's witness statement and attached documents.

[30] The Respondent was advised that if it sought, and was granted leave, to lodge a SiR out of time, then its evidence (meaning relevant documents and witness statements) had to be lodged with the Authority and served on Mr Wright by 14 April 2022.

[31] Mr Wright lodged his witness statement on 31 March 2022. He also provided an affidavit of service on 5 April 2022, regarding his personal service of the service documents on the Respondent.

[32] Once the Covid-19 vaccination requirements were lifted, the Authority converted the Zoom investigation meeting into an in-person investigation meeting. An updated Notice of IM was issued to the parties on 12 April 2022.

[33] The Authority received its first communication from Mr O'Keefe on 18 April 2022, in which the Respondent sought more time to "*understand the issues and understand the company's rights and how best to respond.*"

[34] Mr Wright agreed to an adjournment of the investigation meeting on 20 April 2022 provided the parties were directed to attend mediation within 30 days. On that basis, the investigation meeting was vacated and another DTM to occur within 30 days was issued by the Authority on 19 April 2022.

[35] The investigation meeting was re-scheduled with the agreement of the parties to 2 June 2022. On 29 May 2022 the parties asked for an adjournment of the investigation meeting that was set down for 2 June 2022, on the basis they believed they were making good progress with settlement.

[36] The 2 June 2022 investigation meeting was vacated. This matter was put on an administrative hold, pending Mr Wright's subsequent clarification of his intentions. The Authority advised the parties that it would not set a new investigation meeting date until the parties had completed their settlement negotiations.

[37] On 8 February 2023 Mr Wright advised that he wanted to progress the matter to an investigation meeting. On 8 February 2023 the Respondent was advised that it needed to lodge a SiR, as the Authority had still not received one.

[38] On 15 February 2023 the Respondent's former counsel confirmed that she had instructions to act and she asked for a further 14 days within which to lodge the SiR. This extension was granted, making the SiR due by 1 March 2023. The Respondent lodged its SiR on 1 March 2023.

[39] On 15 March 2023 the Authority emailed the Respondent to advise it had not complied with the DTM and it had not lodged a SiR. The Respondent was given until 18 March 2022 to seek leave to lodge a SiR out of time. The email also recorded that another CMC had been set up on 25 March 2023, so that the matter could be timetabled for a new investigation meeting.

[40] The Authority scheduled a CMC for 17 March 2023. However, on 16 March 2023 the Respondent's former counsel said that she was unable to attend that date. The Authority therefore rescheduled the CMC to 23 March 2023.

[41] Both parties were represented by counsel during the CMC held on 23 March 2023. The timetable directions were recorded in a DoA dated 23 March 2023. It was agreed that an in-person investigation meeting would be held on 20 and, if required, 21 September 2023.

[42] The parties were directed to exchange all relevant documents by 13 April 2023. The Respondent subsequently asked for a two-week extension to 27 April 2023, and that was granted. The Respondent was responsible for preparing and lodging the joint bundle of documents, and that occurred on 12 May 2023.

[43] On 30 May 2023, the Respondent's former counsel emailed the Authority to advise that they had instructions regarding mediation and in connection with settlement of the employment matters, but no instructions to represent the Respondent during an Authority investigation meeting.

[44] On 25 July 2023 the Respondent's lawyer requested an extension of time to 25 August 2023 within which to lodge its evidence because "*there is a genuine prospect of imminent settlement*". This extension was granted.

[45] On 7 August 2023 the Respondent sought a six-week extension to the timetable for the lodging of witness statements, which was granted. However, the Respondent did not lodge its witness statements by the extended deadline of 25 August 2023. Multiple attempts were made by the Authority Officer to engage with the Respondent regarding its missing evidence, without success.

[46] On 29 August 2023 Mr O'Keefe emailed the Authority asking for seven to ten more days within which to lodge the Respondent's evidence. This was not opposed by the Applicant, although he did say that he strongly opposed any adjournment of the investigation meeting in September 2023.

[47] On 30 August 2023 the Authority confirmed to the parties that the investigation meeting would be proceeding as scheduled. The Respondent was given until 31 August 2023 to lodge its witness statements. However, that did not occur. A further extension of time was then also given to the Respondent until 8 September 2023. The Respondent still failed to lodge any witness statements.

[48] At around 4pm on 18 September 2023, the Respondent asked for the investigation meeting to be adjourned. That request was declined and the parties were informed by the Authority that the investigation meeting would be proceeding as scheduled.

[49] The Respondent failed to attend the investigation meeting. The Authority delayed the start of the investigation meeting in case the Respondent appeared. The

Authority also attempted to contact the Respondent by phone and email, without success.

[50] On 20 September 2023 Mr O’Keefe wrote to the Authority saying that he could not attend the investigation meeting on 20 September 2023 but he wanted to attend remotely on 21 September 2023. This request that was made on the morning of the investigation meeting was declined.

[51] The Authority referred to the directions of the Authority dated 23 March 2023 which made it clear that this was an in-person investigation meeting, and that in-person attendance was required because of the material conflicts in the evidence, that needed to be tested by questioning by the Authority.

[52] The Respondent had known that for almost six months, and despite that had applied for remote attendance less than two hours before the investigation meeting was due to start. The Respondent had also failed to lodge any witness statements and the Authority was not confident that if remote attendance had been granted, that would have resulted in the Respondent’s participation in the investigation meeting.

[53] Mr Wright did attend the investigation meeting, so he was questioned for three hours about his evidence. The Authority took him through his witness statement, the information in the Statement of Reply and the documents in the joint bundle to ensure that his claims of unjustified dismissal had been fully investigated.

[54] Mr Wright’s counsel provided brief verbal submissions at the investigation meeting. After that, the Authority issued a preliminary indication of the outcome of Mr Wright’s claim in the hope that could result in the parties reaching settlement of their employment relationship problem. However, that did not occur.

### **The issues**

[55] The following issues are to be determined:

- (a) Was Mr Wright’s dismissal justified?
- (b) If not, what remedies should he be awarded?
- (c) What costs and disbursements should be awarded?

## **Was Mr Wright's dismissal justified?**

### *Justification test*

[56] The Authority is required to assess the justification of Mr Wright's dismissal in accordance with the statutory justification test in s 103A(2) of the Act. This required the Authority to objectively assess:<sup>1</sup>

Whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

[57] Section 103A(3) of the Act sets out four minimum procedural fairness tests that the Authority must consider when assessing justification. In accordance with s 103A(4) of the Act, the Authority may also consider other appropriate factors.

[58] Section 103A(5) of the Act precludes the Authority from finding that a dismissal (or action) was unjustified solely because of minor process defects that did not result in unfairness to the employee.

[59] Justification is to be assessed at the time the dismissal or disadvantage action occurred. The Authority may not step into the employer's shoes and decide what it would have done had it been making the decision at the relevant time.

[60] It must instead apply an objective test about whether or not the actions of the Respondent in this case were within the range of responses that were open to a fair and reasonable employer, in all the circumstances, at the time the dismissal occurred.

[61] A fair and reasonable employer is expected to comply with its statutory obligations, such as the good faith obligations in s 4 of the Act, and each of the procedural fairness tests in s 103A(3) of the Act. A fair and reasonable employer would also comply with its contractual obligations.

### *Good faith*

[62] Section 4(1A)(c) of the Act requires an employer that is proposing to make a decision that may adversely impact on an employee's ongoing employment to provide

---

<sup>1</sup> Section 103A(1) of the Act.

the employee with access to relevant information and an opportunity to comment on it, before a final decision is made.

[63] The Respondent breached its good faith obligations in s 4(1A)(c)(i) and (ii) of the Act to Mr Wright because he was not given any information before he was dismissed. That failure therefore deprived Mr Wright of any opportunity to comment on relevant information the Respondent was considering before he was dismissed.

[64] The Respondent's failure to meet its statutory good faith obligations undermined its ability to justify Mr Wright's dismissal.

*Procedural fairness*

[65] Section 103A(3) of the Act requires an employer to:

- (a) Sufficiently investigate the allegations against the employee;<sup>2</sup>
- (b) Raise its concerns with the employee;<sup>3</sup>
- (c) Give the employee a reasonable opportunity to respond;<sup>4</sup>
- (d) Genuinely consider the employee's response before making a final decision.<sup>5</sup>

[66] The Respondent failed to comply with any of the four minimum procedural fairness tests in the Act. It did not sufficiently investigate its concerns, in breach of s 103A(3)(a) of the Act, because there was no evidence any investigation of the concerns that resulted in Mr Wright's dismissal had occurred.

[67] The Respondent failed to raise its concerns with Mr Wright, in breach of s 103A(3)(b) of the Act. Mr Wright was never given the specific details of the concerns that resulted in his dismissal, or for that matter the concerns that resulted in his warning on 25 November 2020.

[68] Mr Wright was never the subject of a performance management or disciplinary process. The Respondent therefore failed to give Mr Wright any opportunity, much less

---

<sup>2</sup> Section 103A(3)(a) of the Act.

<sup>3</sup> Section 103A(3)(b) of the Act.

<sup>4</sup> Section 103A(3)(c) of the Act.

<sup>5</sup> Section 103A(3)(d) of the Act.

a reasonable opportunity, to respond to its concerns in breach of s 103A(3)(c) of the Act, because the warning and his dismissal were both unilaterally imposed on him.

[69] The Respondent failed to genuinely consider Mr Wright's responses to its concerns because he was deprived of any opportunity to respond to those concerns in breach of s 103A(3)(d) of the Act, because they were not put to him to respond to.

[70] The Respondent's failure to meet any of the minimum procedural fairness tests in s 103A(3) of the Act fundamentally undermined its ability to justify Mr Wright's dismissal.

*Section 103A(5) of the Act*

[71] Section 103A(5) of the Act does not preclude the Authority from finding that Mr Wright was dismissed, because the breaches of minimum procedural fairness requirements and the breaches of good faith were serious, not minor. These fundamental breaches also resulted in considerable unfairness to Mr Wright.

*Substantive justification*

[72] The leading case on a dismissal for non-performance is the Employment Court decision in *Trotter v Telecom Corporation of New Zealand Limited*.<sup>6</sup> The Court set out a non-exhaustive list of the questions that needed to be asked when a poor performance dismissal was being assessed. These included:

- (a) Did the employer in fact become dissatisfied with the employee's performance?
- (b) Did the employer inform the employee of its dissatisfaction and require the employee to achieve a higher standard of performance?
- (c) Was the information given to the employee readily comprehensible, an objective critique of the employee's work and an objective statement of the standards to reach?
- (d) Was the employee given reasonable time to attain the required standards?
- (e) Following the expiry of a reasonable time:
  - (i) Use of an objective assessment of measurable targets;
  - (ii) Fairly putting tentative conclusions before the employee;

---

<sup>6</sup> *Trotter v Telecom Corporation of New Zealand* [1993] 2 ERNZ 659 (EmpC) at 681.

- (iii) Listening to the employee's explanation with an open mind;
- (iv) Considering the employee's explanation and favourable aspects of the employee's service and the employer's responsibility for the situation (for example, not detecting weaknesses sooner or promoting beyond a level of competence);
- (v) exhausting all remedial steps including training, counselling and exploring redeployment.

[73] The Employment Court in *Yan v Commissioner of Inland Revenue* noted that:<sup>7</sup>

The employer's actions are not to be subjected to minute scrutiny in an effort to find any fault, however minor. The overarching question is whether what the employer did and how it did it was what a fair and reasonable employer could have done in all the circumstances at the relevant time.

[74] This is not a case in which the Respondent was able to satisfy the Authority that it genuinely had performance concerns about Mr Wright, because the evidence fell far short of establishing that. There were also indicators to the contrary, such as Mr O'Keefe extending Mr Wright's last day of work and then after his employment had ended offering him an independent contractor role with the Respondent.

[75] It was clear to the Authority that Mr Wright had generated a large amount of revenue which was referred to in paragraph 7 of his witness statement but is not stated in this determination in order to preserve the commercial sensitivity of that information.

[76] The Authority also noted that over the material period New Zealand, and in particular Auckland, had been experiencing the effects of the Covid-19 pandemic. That no doubt affected sales but there was no evidence that had been taken into account by the Respondent before it dismissed Mr Wright.

[77] Despite the Respondent having lodged on 12 May 2023 a bundle of what it said were relevant documents, that did not include any formalised performance management process.

[78] Mr O'Keefe identified in an email to Mr Wright dated 12 November 2019 that it *[d]oesn't look like we'll achieve our target of \$[redacted]*" and that he had been *"[w]orking to develop our sales strategy and process [...]"*.

---

<sup>7</sup> [2015] NZEmpC 36 at [5].

[79] This email was sent by Mr O’Keefe in response to an email Mr Wright had sent him on 11 November 2019 identifying a number of red flags that were impacting on business performance. He identified that the split between the sales and delivery that had previously been agreed had not actually been implemented, because Mr O’Keefe had not picked up the work that he said he would in order for Mr Wright to “*get back into more sales*”.

[80] These emails indicated Mr O’Keefe likely also had some personal responsibility for the poor sales situation, but that was not considered by the Respondent before it dismissed Mr Wright.

[81] Mr Wright’s 11 November 2019 email noted that “*There needs to be a full-time focus*” on sales in order to achieve the volume of work that the Respondent was aiming for. Mr Wright set out things that needed to be done, and signalled that:

I will have reduced capacity in 2020 to work at an operational level in TWH given the two fellowship programmes that I am undertaking = this further reflects the need for us to get underway with recruitment of team and sales sides so that we have people who can follow up and close them.

[82] This signalled that there were shared responsibilities within the Respondent’s business in terms of it meeting its goals, and that both directors had identified in November 2019 that it was unlikely that the targets would be met in 2020. The Respondent failed to explain why the suddenly became Mr Wright’s sole personal responsibility in 2020, when it appeared that responsibility should have been shared by Mr O’Keefe.

[83] Mr O’Keefe’s response email on 12 November 2019 to Mr Wright noted (among other things) that the fact that the Respondent was not on target to achieve sales should be added to the red flag list, along with other items including the need to:

Get clear on your role and capacity in 2020. When? How much capacity? What’s your role and responsibilities? How that impacts the rest of the business and what’s required as a result?

[84] This indicated that the directors still needed to discuss and agree on the scope of Mr Wright’s role and his capacity to do work as an employee of the Respondent’s. However, there was no evidence anything was achieved about those matters, in terms of discussions or agreed outcomes. There was also no clarity achieved on how the various sales challenges should be addressed.

[85] Neither the warning letter nor the dismissal letter to Mr Wright set out what had occurred in terms of getting clear on his role, responsibilities or and capacity in 2020. Nor did the warning or dismissal letters refer to the effect Covid-19 had on the business and in particular sales in 2020.

[86] In an email dated 7 January 2020 that Mr Wright sent to Mr O'Keefe about (among other things) sales and KPIs, he noted that the "*sales system*" was in the process of being developed, but that there was no benchmarks around it.

[87] Mr O'Keefe sent Mr Wright an email on 3 March 2020 that indicated there were differences of opinion between the directors as to how the company should be run, particularly regarding the area of achieving sales/funding targets. That needed to have been properly addressed before Mr Wright could be dismissed for poor performance.

[88] Mr O'Keefe's email dated 3 March 2020 noted that Mr Wright wanted changes to the work he was doing in the business so he asked Mr Wright to give him a list of areas in the company he would enjoy. This indicated that there was considerable flexibility around Mr Wright's role, and that this was not simply a situation where he was an employee who had to achieve a certain level of sales in order to justify his ongoing employment.

[89] The email communications established that there was a mutual agreement that Mr Wright would be reducing the amount of time he spent on sales activities, so it was unreasonable to hold him personally responsible for poor sales in 2020 in such circumstances.

[90] Mr Wright in emails said he thought there should be different metrics that were measured for the sales team. However, Mr O'Keefe and the Respondent did not appear to have adequately addressed that when they should have, because such matters were highly relevant to the level of sales the business achieved in 2020 and to whether or not there had been poor performance.

[91] Mr Wright told the Authority that there was a lengthy sales cycle involved, so a snapshot in any given year would not reflect the true position with the sales that had been achieved. He provided details of specific sales, which the Authority has not recorded in this determination but which appeared significant. There was no evidence the Respondent had adequately considered that before dismissing Mr Wright.

[92] Mr O'Keefe emailed Mr Wright on 22 June 2020 asking to set up a formal performance review, but there was no evidence that occurred. Mr Wright wrote to Mr O'Keefe on 23 June 2020 setting out that there was a need for there to be clarity about his role and responsibilities. However, that did not occur.

[93] Mr Wright pointed out that Mr O'Keefe had chosen a wrong target audience which had led to zero sales for two sales staff. That feedback was not considered, or addressed, before Mr Wright was dismissed. The directors agreed that they needed new sales team members that focussed only on sales or funding and that a more suitable role needed to be established for Mr Wright. That strongly suggested dismissal was not fair or reasonable as he had other work to do.

[94] Mr Wright pointed out that the business was not set up in a way that would have enabled it to achieve its sales targets either in sales or delivery and that he was not solely personally responsible for sales because he worked across multiple areas in the business, with sales being only one of them. He also raised a number of issues regarding the value ladder and the sales model, but the Respondent did not address those before he was dismissed.

[95] Mr Wright said he was interested in spending not more than 20 percent of his time on sales activities, because he was interested in more than just revenue generation. The directors scheduled some time on 1 July 2020 for there to be a review of Mr Wright's role, but the details of that were not provided to the Authority.

[96] On 28 July 2020 Mr O'Keefe emailed Mr Wright in response to a meeting they had the previous evening to say that "*the business sales are not in a good state*" and that "*the data confirms your performance as unsatisfactory*". That data was not provided to Mr Wright or the Authority.

[97] Mr O'Keefe also recorded that Mr Wright said he was not interested in continuing with sales, so Mr O'Keefe suggested setting up a meeting to review Mr Wright's current workload and to revise his employment agreement.

[98] These email communications show that Mr Wright was not only focussed on sales, and that the directors had agreed that his time would be spent elsewhere. On 22 September 2020 Mr O'Keefe emailed Mr Wright to say "*I need your workplan asap to plan for the reduction of your work hours*".

[99] This was an acknowledgement that Mr Wright was spending less time in sales, by agreement of both directors, than he had previously. It was therefore unrealistic to expect him to be increasing the Respondent's sales in such circumstances.

[100] The written warning Mr O'Keefe issued to Mr Wright on 25 November 2020 stated "*Your performance is unsatisfactory and there is a possibility of dismissal if your performance does not improve.*" He referred to a shortfall in cashflow and said "*If this is not improved you will be dismissed as an employee of the company.*"

[101] That was not a fair, reasonable or objective critique of Mr Wright's work. It did not explain why he should be held solely responsible for the poor business sales, particularly in a Covid-19 environment and when he had significantly reduced the time he spent on sales activities. There was no readily comprehensible or objective critique of Mr Wright's work. There was no objective statement by the Respondent of the standards he had to reach.

[102] Although the warning referred to a three-month timeframe, on 23 December 2020 (less than a month later) Mr O'Keefe dismissed Mr Wright on four weeks' notice. The reason given for dismissal was that:

The company requires improved business development in sales areas from its limited resources. The company has tried many different things, including feedback and discussions, to improve your performance over the last year (many of these are documented in a series of emails).

[103] However, the emails produced to the Authority did not support that claim, so this statement was not accepted as credible.

[104] Once again Mr Wright was not given any formal notification of his dismissal. He was not subject to a performance monitoring or performance improvement process. The emails referred to were minimal and have been quoted by the Authority in this determination.

[105] If there were documented performance concerns then the Authority expected to have seen those emails, particularly when the Respondent was responsible for lodging the joint bundle of documents which was used during the investigation meeting.

[106] There is no evidence that Mr Wright was given specific or realistic targets to meet, or even that it was his role or responsibility to meet those targets. There were no

recorded expectations or measures prepared for him. He had no opportunity to address whether they were realistic or reasonable, even if they had fallen within his area of responsibility.

[107] While there had been discussions between the directors about the direction of the company, the strategies to be adopted, and the need to expand the sales team, along with changes to Mr Wright's focus and role, these were not formally documented, so the Authority was unable to conclude that there had been agreement reached. Mr Wright's evidence was that there had not been, so in the absence of any contradictory evidence that was accepted by the Authority.

[108] A fair and reasonable employer would not provide a warning which set out a three-month timeframe for improvement but then dismiss the employee less than one month later, without there having been any process or procedure in place to address its concerns.

[109] No information was provided to Mr Wright in advance of either the warning or the dismissal letters. He had no opportunity to be heard, so therefore had no input into whatever the concerns were that had resulted in the warning and dismissal.

[110] The Respondent was therefore unable to establish that Mr Wright had been given a reasonable time to attain the required standards, even if they had been reasonable, which the available evidence had not established.

[111] Not only was the timeframe between 25 November and 23 December 2020 unreasonable and unjustified, but the Respondent also failed to use an objective assessment of measurable targets.

[112] It failed to put any tentative conclusions to Mr Wright before taking disciplinary, and then dismissal, action against him. He was never given an opportunity to be heard, much less had his explanation listened to with an open mind. There was no evidence that anything favourable to Mr Wright had been considered or weighed into the balance before the warning and dismissal letters were issued.

[113] The Respondent did not take any remedial steps. There was no training, counselling or exploring redeployment other than the suggestions in the emails that have been cited in this determination, but which the Authority finds did not go

anywhere. Mr Wright was never put clearly on notice of what the issues were, why he was responsible for them, or what standard he was required to meet.

[114] A fair and reasonable employer could not have dismissed a senior employee like Mr Wright, who was also a Co-Founder of the business and the other most senior person there along with the other director Mr O’Keefe, less than one month after only one written warning.

[115] The limited evidence produced to the Authority did not establish that Mr Wright was personally responsible for any sales related shortfall that had occurred, or that warning him and then dismissing him for that was fair or reasonable in all the circumstances.

[116] A fair and reasonable employer is expected to comply with its contractual obligations. However, the Respondent failed to comply with clause 12 of Mr Wright’s individual employment agreement, which dealt with “*warnings and dismissals*”.

[117] Clause 12.1 of Mr Wright’s employment agreement required the Respondent to follow a fair disciplinary process. That did not occur, for either the warning or his dismissal.

[118] Clause 12.5 of Mr Wright’s employment agreement required the Respondent to advise him of his right to representation through the warning and dismissal process. That did not occur either for the warning or regarding his dismissal.

[119] Clauses 12.6 to 12.9 of Mr Wright’s employment agreement required the Respondent to put allegations to him for his comment, and to consider his responses to the same. That did not occur.

[120] There was insufficient evidence to establish that the Respondent was genuinely concerned about Mr Wright’s alleged poor performance. Schedule 4 of Mr Wright’s employment agreement stated:

The employer shall fix monthly performance targets with you from time to time. Should you fail to achieve these performance targets for three consecutive months, the employer has the right to terminate the employment agreement following due process.

[121] There were no fixed monthly performance targets. There was no evidence provided to the Authority to establish that Mr Wright had failed to meet performance

targets for three consecutive months. There was also no “*due process*” before Mr Wright was dismissed.

[122] Accordingly, the Respondent did not meet any of the minimum requirements it set for itself in Schedule 4 of Mr Wright’s employment agreement. Failing to follow the clear and express terms of the employment agreement are not the actions of a fair and reasonable employer.

[123] The Respondent’s failure to comply with its contractual obligations to Mr Wright undermined its ability to justify his dismissal.

[124] As a Co-Founder Mr Wright worked in all parts of the business. He did not have a defined job description, and his main area of interest was in strategy and delivering training. However, Mr O’Keefe unilaterally allocated Mr Wright sole responsibility for sales and then called him a “*poor performer*”.

[125] Mr Wright said that Mr O’Keefe’s view on his (Mr Wright’s) performance was constantly changing and conversations they had about sales were never formalised. The warning issued on 25 November 2023 could not be relied on by the Respondent, as it was procedurally and substantively unjustified. Mr Wright’s uncontested evidence that the warning was based on unfair claims and assumptions was accepted.

### *Finding*

[126] The Respondent’s actions, and how it acted, were not what a fair and reasonable employer could have done in all the circumstances at the time that it issued the warning to Mr Wright, and at the time he was dismissed.

[127] The Respondent failed to meet its good faith obligations, it failed to meet its contractual obligations, it failed to meet any of the four minimum procedural fairness tests in the Act.

[128] The Respondent also failed to provide credible evidence that supported the alleged performance concerns. The limited evidence that was produced to the Authority strongly indicated that Mr Wright was not responsible, or at least solely responsible, for any sales issues that applied.

[129] A fair and reasonable employer could not have concluded that Mr Wright's performance was so substandard that he should have been issued with a warning, much less dismissed.

[130] Mr Wright's unjustified dismissal claim succeeds, because his dismissal on 23 December 2020 was procedurally and substantively unjustified.

### **What remedies should be awarded?**

#### *Mitigation of loss*

[131] The Authority was satisfied that Mr Wright appropriately mitigated his loss. As a director of the Respondent he had a duty of fidelity to it which limited his alternative employment options.

[132] Mr Wright did however accept an offer from Mr O'Keefe to contract his services to the Respondent, which he did. However, despite submitting invoices for the work he did he has still not been paid for that work. Recovery of those arrears are outside the Authority's jurisdiction.

#### *Lost remuneration*

[133] Mr Wright claimed lost remuneration of \$22,733.72 gross for the three months period following his unjustified dismissal. His evidence about that was accepted by the Authority, as it was uncontested.

[134] Accordingly, the Respondent is ordered under s 128(2) of the Act to pay Mr Wright \$22,733.72, being three months' ordinary time lost remuneration.

#### *KiwiSaver contributions*

[135] Mr Wright is a KiwiSaver member, so the Respondent is required to make the necessary employee and Compulsory Employer Contributions ("CEC") on the lost remuneration he has been awarded in this determination and remit to those Inland Revenue Department in the normal way.

[136] The loss of Mr Wright's KiwiSaver contributions is a lost benefit under s 123(1)(c)(ii) of the Act, so it is recoverable. Based on the three percent CEC, the Respondent is ordered to pay Mr Wright \$682.01.

*Holiday pay*

[137] In accordance with s 25(2) of the Holidays Act 2003 the Respondent is ordered to pay Mr Wright \$1,818.70, being eight percent holiday pay on the lost remuneration he has been awarded in this determination.

*Distress compensation*

[138] Mr Wright told the Authority how shocked he was to receive the written warning out of the blue. He had no indication that was about to occur, so was blindsided by it.

[139] He was also shocked and very hurt to be dismissed two days before Christmas. It made him feel extremely anxious about 2021 and he was unable to seek legal advice about it given the Christmas shutdown holidays with most legal firms being closed round that period.

[140] Mr Wright felt totally undermined because his character and dedication to his work had been called into question. He described feeling emotionally hurt that all of the valuable and important work he had been doing had not being recognised, acknowledged or appreciated.

[141] Mr Wright as a Co-Founder of the business was to some extent the face of it. He suffered reputational damage, hurt and humiliation when Mr O'Keefe removed all references to him from the company's website. Mr Wright said that had raised red flags with clients, who expressed confusion about why Mr Wright was no longer part of the company but was still delivering governance training on behalf of the Respondent.

[142] Mr Wright described to the Authority how his personal brand is heavily tied to the Respondent. He said that being thrown out of the company, blocked and shut out of information and removed from the website damaged his personal brand and his credibility in the marketplace.

[143] Mr Wright had heard from clients that Mr O'Keefe had told them he did not know what was up with Mr Wright, who had gone off to do his own things. According to some clients who followed that up with Mr Wright directly, this had created an impression that he had chosen to leave the company on his own accord.

[144] Mr Wright believed that created an incorrect perception for clients that he no longer deemed them or their work important, which he pointed out to the Authority was not the case at all.

[145] Mr Wright described the shame and embarrassment he suffered was particularly distressed about his reputation being seriously damaged based on Mr O'Keefe's false allegations against him. Mr Wright said that the way he was dismissed right before Christmas made it look suspicious which also adversely impacted on his reputation. He said that he felt when clients approached him to speak about the situation they were doing so with a sense of suspicion.

[146] Mr Wright pointed out that the Māori business world is small and very connected and he had heard that his dismissal had sparked rumours that he must "*have done something dodgy*" in the company. It was therefore important to Mr Wright that he achieved a public restoration of his reputation.

[147] Mr Wright said he had to turn to close friends for emotional support to deal with the stress and grief his dismissal had caused him. He said that he started to lose trust in people and experience financial insecurity which had a significantly detrimental impact on his relationship. He told the Authority he believed that the stress of his dismissal had contributed to the ending of that relationship.

[148] Mr Wright told the Authority he felt particularly aggrieved by his dismissal because he felt that it was part of a premeditated plan by Mr O'Keefe to remove him from the company he had co-founded. Mr O'Keefe removed Mr Wright's access to the company Google drive folders, he was told he was not able to access any financial records including Xero or the bank accounts and that he no longer needed a phone plan or for the Respondent to contribute to his home office expenses.

[149] Mr Wright told the Authority that his unjustified dismissal had had a significant adverse impact on his self-confidence, which he believed had impacted his ability to perform well and he described himself as still battling self-doubt.

[150] Mr Wright spoke at length about the distress and humiliation he suffered as a result of the cultural responsibility he carried, in terms of ensuring that the Respondent upheld certain cultural values.

[151] As a Māori enterprise the Respondent was gifted the name ‘Te Whare Hukahuka’ which was a symbolic name drawn from ancestral korero, by a well-regarded iwi leader of their first iwi partner before the business was even legally set up and before Mr O’Keefe was part of the business.

[152] Mr Wright said he was the sole leader of the cause at that point, and continued to carry a great responsibility on his shoulders to ensure that the business was operating in accordance with Māori values and principles worthy of such a prestigious name. He said that it was “*a weight that is hard to quantify*”.

[153] Mr Wright expressed sorrow that since his unjustified dismissal he did not feel he could properly uphold those values. He stated to the Authority that he had “*Made a commitment to honour this name. It has caused me great stress, frustration, worry and concern because I have been prevented from honouring that name.*”

[154] The Authority acknowledges that Mr Wright’s unjustified dismissal has had a significantly adverse impact on him. Accordingly, the Respondent is ordered to pay Mr Wright \$30,000 under s 123(1)(c)(i) of the Act to compensate him for the humiliation, loss of dignity and injury to feelings he has suffered as a result of his unjustified dismissal.

#### *Contribution*

[155] Having determined that Mr Wright’s dismissal was unjustified, s 124 of the Act requires the Authority to assess the extent to which his actions contributed towards the situation that gave rise to his dismissal grievance and, if required, reduce remedies accordingly.

[156] Contribution denotes blameworthy conduct that have been proven on the balance of probabilities. In other words the Authority had to be satisfied that it was more likely than not that Mr Wright had engaged in blameworthy conduct that had contributed to his dismissal.

[157] That was not the case. The evidence fell far short of establishing any blameworthy conduct by Mr Wright, so his remedies are not to be reduced under s 124 of the Act.

**What costs and disbursements should be awarded?**

[158] Mr Wright as the successful party is entitled to a contribution to his actual costs. He sought an award of \$4,500 towards his actual costs.

[159] This matter involved a half day investigation meeting, so the starting point for assessing costs is \$2,250, being half of the current notional daily tariff, which is currently \$4,500 for the first day of an investigation meeting.

[160] The notional starting tariff needs to be adjusted to reflect the particular circumstances of this matter. There are no factors that warrant a reduction being made to the notional starting tariff. However, the manner in which the Respondent elected to conduct itself unreasonably and unnecessarily increased Mr Wright's costs, so that should be reflected in an increase to the notional starting tariff.

[161] The Respondent's failure to engage with the Authority's many attempts to communicate with it, in the requirements for personal service by Mr Wright, its multiple timetable breaches, its repeated requests for more time and then failure to meet the extended deadlines increased Mr Wright's costs because these were communications that would not otherwise have been necessary, had the Respondent properly engaged in the Authority's investigation.

[162] The notional starting tariff should be increased by \$1,000 to reflect that, so the Respondent is ordered to pay Mr Wright \$3,250 towards his actual legal costs. That amount is less than his actual legal costs.

[163] The Respondent is also ordered to reimburse Mr Wright \$692.56 for his disbursements, consisting of:

- (a) \$71.56 filing fee for this matter; and
- (b) \$621 service fee costs for three different sets of documentation on the Respondent's registered address for service.

**Outcome**

[164] The Respondent's dismissal of Mr Wright was procedurally and substantive unjustified, as was the written warning he was given on 25 November 2020.

[165] Within 28 days of the date of this determination, the Respondent is ordered to pay Mr Wright \$55,926.99 gross consisting of:

- (a) \$22,733.72 lost remuneration;
- (b) \$682.01 compulsory employer contribution to KiwiSaver;
- (c) \$1,818.70 holiday pay;
- (d) \$30,000 distress compensation; and
- (e) \$692.56 disbursements.

Rachel Larmer  
Member of the Employment Relations Authority